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Dallas D. Erickson, Testimony
Senate Judiciary Committee
HB 597
April 4, 2007

Mr. Chair and Members of the Committee,

I am Dallas Erickson and I represent Montana Citizens for Decency through Law.

Montana is arguably the most permissive state in the nation when it comes to obscenity and material harmful to minors as well as sexually oriented businesses. We are one of only four states that does not have an obscenity law that makes it illegal to disseminate obscenity to EVERYONE. Here it is only illegal to disseminate obscenity to children.

There is material, however, that is not considered "obscene" by the courts and the Supreme Court said communities have an "exigent" duty to protect children from it and then they defined it and called it Harmful to Minors Material. (Ginsberg v New York)

Early in the 1970's it became apparent that under Montana law most communities could not pass more restrictive laws in the area of obscenity than the state law. Most counties could not either because they are classified as "General Powers" Counties and can only pass laws that the state has passed or has allowed them to pass.

We joined with others in a successful initiative process to change the state law to allow communities, including counties, to pass more restrictive laws than the state had. The state obscenity law allowed the sale of child pornography and "snuff" films where the actress is actually killed to appeal to those prurient interests. The initiative to change the obscenity law was Initiative 79 and it passed in 1978. The initiative put in this subsection of the obscenity law at 45-8-201:

(5) Cities, towns, or counties may adopt ordinances or resolutions which are more restrictive as to obscenity than the provisions of this section.

(We wrote and helped usher through the legislature in 1993 the state's child pornography law or "sexual abuse of children" statute to address the child pornography problem).

In 1989 we worked with the legislature to attempt to pass a Harmful to Minors bill. It is important to understand the difference between Harmful to Minors and Obscene. Briefly, Obscenity was defined in the 1973 Miller v California case:

> (1) the average person, applying contemporary community standards, would find that the material or performance, taken as a whole, appeals to the prurient interest; and (prurient means morbid and shameful lust. Rape for example is morbid and shameful)
> (2) the average person, applying contemporary community standards, would find the material or performance depicts or describes, in a patently offensive way, sexual conduct, sadomasochistic sexual abuse, or lewd exhibition of the genitals; and
> (3) to a reasonable person the material or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The court said: "This much has been categorically settled by the Court, that obscene material

is unprotected by the First Amendment."

The definition of Harmful to Minors was given in the 1969 *Ginsberg v. New York* case and refined in other cases:

> (a) the average person applying contemporary community standards would find, taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion, and
> (b) the average person, applying contemporary community standards would find depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, ultimate sexual acts, normal or perverted, actual or simulated, sado-masochistic sexual acts or abuse, or lewd or lascivious exhibition of the genitals, pubic area, buttocks, or post pubertal female breast, and
> (c) a reasonable person would find, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

This is called the "Millerized" Ginsberg test. In the third prong of the test the Montana House added wording to 45-8-205 to indicate that if it is okay for a 17 year old it has to be considered okay for a five year old, one of the major problems of the present statute.

Note that the courts lowered the standard by inserting in the *Miller* test "with respect to what is suitable for minors" wording. Harmful to Minors material can be equated with so-called "soft-core" pornography that the courts have said is **not obscene** and so the dissemination of such material to adults can not be controlled but children can be protected.

The bill that we wrote and worked to get passed in 1989 was passed unanimously in the Democrat controlled Senate. In the Democrat controlled House it was carried by Representative Jim Rice and we saw it destroyed by the House Judiciary Committee Chaired by Dave Brown. They made it unenforceable and then passed it. The fact that it has never been used is proof of what they did to the bill. They even changed the name to "obscene to minors" (of which there is no legal definition in federal cases) and it passed in the form of 45-8-205, 45-8-206, 45-8-207 and 45-8-208.

One of the problems with this law is found in 45-8-206:

"**45-8-206. Public display or dissemination of obscene material to minors.** (1) A person having custody, control, or supervision of any commercial establishment or newsstand may not knowingly or purposely: . ."

Note that the only ones that can be charged with dissemination of soft-core pornography to a minor is a person involved in a "commercial establishment." Molesters commonly show children Hustler type of material to children to groom them for molestation. Under the present law that is legal.

Assuming we had the legal authority to pass more restrictive laws than the present law on "obscene to minors" we have been successful in passing laws in 9 communities all over the state, from Lincoln County to Great Falls to Manhattan and Clyde Park. We attempted to pass a law more restrictive than the state law in Ravalli County by submitting a petition in 2002. The County challenged the law as unconstitutional and invalid.

On October 10, 2006 Judge Langton issued a decision on this petition and proposed law in Montana Twenty-First Judicial District Court. I have passed out the relevant part of Judge

Langton's decision on the Harmful to Minors proposed law. Cause No. DV-02-167. In the conclusion the Judge writes:

> "The Court further concludes that the proposed Displaying or Disseminating Material Harmful to Minors ordinance, which is more restrictive than the corresponding state statute codified at §§ 45-8-206, restricts the distribution of obscene material beyond the scope of § 45-8-201(5) because it impermissibly changes the definitions codified at §§ 45-8-205. Therefore, the proposed Displaying or Disseminating Material Harmful to Minors ordinance would be invalid and illegal if enacted by the voters of Ravalli County. Accordingly, this portion of the County's motion for summary judgment should be granted."

Judge Langton's decision to find the Proposed Harmful to Minors law unconstitutional was based on the fact that the state obscenity law 45-8-201 at subsection (5) did not include the other statutes that comprise the obscene to minors law. The 1989 legislature added 45-8-206 in the state law with the intention of allowing communities to pass more restrictive laws than the state law.

We are here to ask you to add all those sections of the obscene to minors statute so that local communities can pass more restrictive laws than the worthless state law on Obscene to Minors and protect children from ANYONE that would desire to show or disseminate Harmful to Minors material to them.

This bill would address Judge Langton's decision and make it so communities can really do as the Democrat controlled legislature intended in 1989.

Thank you.

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